(29)

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, Petitioner
vs.
Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, Petitioner
vs.
Johanna F. Fiske, *et als.* — No. 122

Petitioner's Motion for Leave to File A Motion to Vacate the Order Denying Certiorari (As Being Out of Time) Upon the Ground That, As Is Shown by the Said Order, This Court Was Mistaken Respecting the Identity of the Judgment Sought to Be Reviewed

S. Mayner Wallace
Petitioner *pro se*

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, Petitioner vs. Johanna F. Fiske, *et als.*		No. 121
S. Mayner Wallace, Petitioner vs. Johanna F. Fiske, *et als.*		No. 122

Petitioner's Motion for Leave to File A Motion to Vacate the Order Denying Certiorari (As Being Out of Time) Upon the Ground That, As Is Shown by the Said Order, This Court Was Mistaken Respecting the Identity of the Judgment Sought to Be Reviewed

May it Please the Court:

Here, there was a Petition for two writs of certiorari to review (in the light of the provisions of the FEDERAL RULES OF CIVIL PROCEDURE) the dismissal of a cross-appeal and, also, the sustention of an appeal, by separate orders on November 16, 1940, in one case, in the United States Circuit Court of Appeals for the Eighth Circuit.

Upon docketing that Petition, the petitioner moved for leave to proceed here upon a shortened record.

On January 31, 1941, during the same Term of the Court of Appeals, the judgment on the merits, then under review there, was affirmed on the said appeal.

Within three months after the denial below (Mar. 5, 1941) of a timely petition for a rehearing of said affirmance, this Petition for certiorari was docketed here—on June 2, 1941.

This Court's order on said Petition, at the present Term, reads as follows:

> "In No. 122, the petition for writ of certiorari to review the judgment entered November 16, 1940, rehearing denied November 27, 1940, is denied on the ground that it was not filed within the time provided by law. 28 USC sec. 350.
>
> "In No. 121, the motion for leave to dispense with the filing and printing of unnecessary portions of the record is denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied."

It is respectfully submitted that the Court, therefore, *mistakenly assumed* that petitioner was seeking to review the said judgment upon the merits (which was in his favor) and, also, to review one (but not both) of the said earlier orders.

The Motion for leave to proceed upon a shortened record applied solely to the application to review both of the said orders—and not to the said judgment upon the merits.

The Petition for certiorari prayed no review of that judgment upon the merits, but did pray a review of both of said orders.

Said judgment was and is material only as fixing the time when both of those orders became final for review here.

Petitioner has heretofore faithfully endeavored in prayers for a rehearing (which are now respectfully incorporated by reference) to present this case, from another and a broader standpoint, to the Court.

It is also respectfully submitted that correction of the error aforesaid will most probably result in the grant of the two writs of certiorari—particularly in the light of the Opinion here, handed down on May 11th instant, in *Susan G. Reeves, petitioner,* vs. *William Beardall, as executor, etc.,* No. 841 of this Term, where (but for the Federal Rules of Civil Procedure) a judgment, of a District Court, would not (because of principles governing the instant case) have been deemed final for appeal.

The vital factor in the instant case was and is whether the time for certiorari ran from November, 1940, or from March, 1941,—whether the said orders in November, 1940, were final or were interlocutory.

Wherefore, the petitioner, for the reason above given, prays that this Motion be granted and for all other proper relief; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. Mayner Wallace
Petitioner *pro se*

St. Louis, Mo.
May, 1942

Certificate

The undersigned, S. Mayner Wallace, petitioner above, a member of the Bar of this Court, certifies that, in his opinion, the foregoing Motion is well founded; that the same is not interposed for delay but is presented and filed in good faith because he believes the same ought to be granted.

S. Mayner Wallace
Petitioner *pro se*